Case Analysis : Dr. D. C. Wadhwa v. State of Bihar

By **Sneha Mahawar** - July 14, 2021

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Facts of the case

In this case, the petitioner, Dr D.C. Wadhwa was a professor of economics in Pune and had filed a PIL challenging the general power of the Governor to re-promulgate various ordinances by the governor of Bihar. The petitioner had extensively researched and published about the misuse of the ordinance making power of the governor of Bihar because the government of Bihar had promulgated 256 ordinances between 1967 and 1981 and these 256 ordinances were kept alive for periods ranging between one and fourteen years by mechanically re-promulgating the ordinances without changing any content of the ordinance or trying to turn it into an Act.

The general power of the Governor to re-promulgate the ordinance was examined by the court as several ordinances had been re-promulgated over thirty times. The immediate challenge was to the three ordinances that were kept alive for a period of 10-14 years. The main issue contested was whether the Governor could mechanically re-promulgate the ordinance for an indefinite period of time, and thus take over the power (from the legislature) to legislate through the powers conferred on him under Article 213.

Issues of the case

The issue in the case holds great constitutional law importance as the executive was taking over the power to him to legislate by way of re-promulgating the ordinances. This

practice of the executive is a violation of the constitutional provision as every citizen has a right to be governed by laws made in accordance with the Constitution i.e. the legislature and not by-laws made by the executive.

Arguments framed and judgment delivered

There were various arguments made by the respondents that the petitioners had no locus standi to maintain the writ petition since they were outsiders who had no legal interest to challenge the validity of re-promulgation of the ordinances. Also, it was contended that the two ordinances had already been enacted into an Act of Parliament and the third ordinance was sent as a proposal to be enacted into an Act, thus the question was merely academic in nature. All these arguments were turned down by the court as the third ordinance, though presented as a proposal to the parliament, was still in force. Another reason that made the court adjudicate upon this issue was that the court noted that the ordinances promulgated under Article 123 had never been re-promulgated till the pendency of this suit but the Government of Bihar was keeping alive various ordinances bypassing circulars which clearly directed various officials to mechanically re-promulgate the ordinances as soon as they expire. The maximum time an ordinance was re-promulgated was 39 times. In the end, the court ruled that the mechanical re-promulgation of the ordinances for a period of one to fourteen years without going to the legislation was a colourable exercise of power by the executive and ruled that re-promulgation of ordinances was unconstitutional.

The judgment delivered by Bhagwati, J falls apart when the court says that there may be times when the parliament cannot deal with the promulgated ordinances because of a shortage of time. Therefore the court gave two exceptions to this rule in which re-promulgation can be allowed; firstly, if the legislature cannot take it up due to existing legislative business; secondly, if the government feels that an emergent situation has emerged and re-promulgation is necessary to deal with it.

Problems attached with the judgment

Of course, this was a faulty judgment for several reasons. One of the reasons, to begin with, is that the court did not go into the question of what would happen to the effects that have been made by these failed ordinances. Reconciling this case and T. Venkata Reddy's case would essentially mean that the effects of such failed ordinances that are re-promulgated would remain as it is, though the ordinances re-promulgated have been declared as unconstitutional in nature. Moreover, there is a false distinction on the scope of judicial reviewability between this case and T. Venkata Reddy's case. Another counter effect was due to the problematic exceptions provided in the case as after the judgment, re-promulgation of ordinances rather increased; 53 ordinances were re-promulgated between 1991and 1993 and some were promulgated at least five times.

This case was subsequently also cited in the case of Krishna Kumar v State of Bihar which dealt with various issues related to promulgation of ordinances and re-promulgation was also something that the court commented upon. The court in this case slightly differed from the view held in the case of D.C. Wadhwa by stating that re-promulgation of an ordinance is an unconstitutional practice; the ordinance should be mandatorily laid down in the parliament for the necessary debate to take place and not

doing so would be an abuse of constitutional process. The difference was mere of the exceptions given in the D.C. Wadhwa case but it is suggestive from justice Lokur's opinion that the court did not explicitly overrule the D.C Wadhwa case rather only differed from it. So Krishna Kumar's case seems to have left the answer to the practice of re-promulgation incomplete.

Could the judgment be tackled in a better way

To answer the question of how D.C Wadhwa's judgment could be tackled in a better way we must look at the intention of the members of the constitutional drafting assembly by exploring the arguments given at the time of drafting and incorporating such articles in the constitution, of what they wanted us to perceive of these articles. After which we can look at some other jurisdictions where such a power, as envisaged in Articles 123 and 213 are present and how these countries look at the exercise of re-promulgation of ordinances

Constitutional Assembly Debates

The ordinance-making power of the president and the governor are a legacy of the colonial past which the British decided to do away with this power to legislate but the drafting committee incorporated them as articles 123 and 213 in the Constitution. They were adopted from Sections 42 and 43 of the Government of India Act, 1935 which vested parallel legislative power in the governor-general of India. These articles were severely criticized in the constitutional assembly debates as they do not go well with the elected and the representative polity.

The Constitution provides that an ordinance must be placed before the legislature within six weeks of its reassembly but the maximum duration of such an ordinance would be about seven and a half months. The duration of an ordinance was highly criticized in the debates like H.V. Kamath felt that six weeks from the date of the reassembly was too long and was worried that a president inclined to dictatorship might take undue advantage of the articles. H.N. Kunzu also wanted something similar, instead of six weeks he advocated for four weeks. However, the most articulate voice against the ordinance was from K.T Shah who advocated for the ordinance to not last a minute longer than such extraordinary circumstances and also suggested for the ordinance to end as soon as the Parliament reassembled. The members hardly spoke against the very idea of the ordinance making power but the discussions were limited to nature and scope of the ordinance and what all limits they could put on an ordinance but Ambedkar disapproved of all these suggestions and the articles were incorporated as they stand today. According to Shubhankar Dam, Ambedkar was too trusting in the successive presidents to come and Ambedkar believed that because these articles envisage too much power in the executive, the successors would be too mindful and extremely cautious to use these provisions of the constitution and he also trusted that these provisions would be used only in the state of grave emergency and the executive would not let the ordinance to be in effect for an unduly long period of time. Also, the constituent assembly rejected the idea of a substantive limit on the ordinance-making power.

Suggestions

As suggestive from the arguments given above, the main point of friction in these debates was the time period for which the ordinance would remain in effect. The intention to shorten the time period after the re-assembly of the Parliament shows that the drafters didn't want the people to be governed by the laws made by the executive which would be violative of the constitutional provisions for long. It is important to note that there was no debate about the re-promulgation of the ordinance which is evident as the process of re-promulgation is doing nothing but buying more time to the legislature to deal with the emergent situation. But the question becomes more complex in terms that, if the situation arisen was really emergent that the legislators could not have waited for the next session of the state assembly or Parliament to begin, wouldn't the first order of business of the session would be dealing with the situation and trying to enact the promulgated ordinance into an Act of Parliament because promulgating an ordinance is just a temporary solution to the situation arisen as it still has not become an Act of the Parliament. A country like Brazil also has such provision present in their constitution where the executive can promulgate ordinances and the constitution also allows the executive to re-promulgate the ordinance once after it lapses; after the ordinance would lapse the second time the ordinance would automatically be converted into the law as it is. The only thing different in terms of the construction of the article in Brazil is that it has certain restrictions on this power where the executive cannot formulate any ordinance. As established in the above paragraph that the intent of the members of the drafting committee was not to narrow the ambit of the ordinance making power, going with Brazil's model wouldn't be feasible as the ambit of such power with the executive in India is too wide.

What could have been done

Firstly the exceptions given by Bhagwati J were not required if the court is itself calling the re-promulgation practice unconstitutional. The court rather than saying that the session might be too short for the legislators to deal with the ordinance could have instead suggested increasing the duration of the session to deal with the ordinance promulgated because of the power or promulgation is contingent upon an emergent situation arising. If the legislators are not dealing with that emergent situation, this would mean that either the legislators are not competent to deal with such a problem or the problem in itself was not so emergent and could have waited for the next session to reconvene.

The second thing that the court must have ensured that no ordinance holding substantial similarity to an already expired or lapsed ordinance, must also not be promulgated. This becomes necessary looking at the number of years and number of times an ordinance has been re-promulgated. To explain with an example, let's suppose that the state comes up with an ordinance penalising some criminal activity for a maximum of 14 years and it does not propose such ordinance in front of the parliament to be enacted into an act rather after it has lapsed the state promulgates a new ordinance which penalises the same activity for 12 years.

Looking at the two the state could easily argue that the two ordinances are different as the duration of punishment has been reduced and so it isn't re-promulgation of the

lapsed ordinance but considering that the activity penalised by the ordinance is the same, the ordinance must be perceived as a re-promulgated one. The court also fails to comment upon what would happen to the effects created by such ordinances. Considering the fact that the re-promulgated ordinance has been declared as unconstitutional the court must have ruled that the effect of the ordinance shall be void ab initio in case it is withdrawn, lapses.

Conclusion

The ordinance making power has been severely criticized by many and people like Rajeev Dhawan describe this power as creating legislation by cheating democracy; continuing such practice of re-promulgation is even a bigger fraud as it is a continuation of a practice (ordinance making) that does not go well with the elected and representative polity as envisaged in our constitution. Thus, the practice should have been stopped by the court in D.C Wadhwa's case itself or the Supreme Court must have over-ruled the case in Krishna Kumar's judgment.
